

State of New Hampshire



PERSONNEL APPEALS BOARD

25 Capitol Street

Concord, New Hampshire 03301

Telephone (603) 271-3261

Appeal of Valerie Smith

New Hampshire State Liquor Commission

Docket #2009-D-001

January 2, 2009

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, October 29, 2008, under the authority of RSA 21-I:58, Chapters Per-A 100-200, and Chapters Per 100-1500 of the NH Code of Administrative Rules, to hear the appeal of Valerie Smith, an employee of the New Hampshire State Liquor Commission. Ms. Smith, who was represented at the hearing by SEA Grievance Representative Randy Choiniere, was appealing a letter of warning issued to her on July 3, 2008 under the provisions of Per 1002.04 (b)(11) for allegedly violating Liquor Enforcement Bureau policies regarding unsatisfactory work performance and the reporting of misconduct. Bureau Chief Eddie Edwards appeared on behalf of the Liquor Commission.

The appeal was made on offers of proof by the representatives of the parties. The record of the hearing in this matter consists of pleadings submitted by the parties, the audiotape recording of the hearing on the merits of the appeal, notices and orders issued by the Board, and documents admitted into evidence as follows:

State's Exhibits:

- A. August 11, 2008 Letter from Eddie Edwards to PAB (with attachments)
 1. December 24, 2007 Letter of Counsel issued to Lt. Smith
 2. November 26, 2007 email from Deputy Chief Dunn to Lt. Smith
 3. NH Bureau of Liquor Enforcement and Licensing Administration & Operations Manual
 4. July 3, 2008 Letter of Warning issued to Lt. Smith
 5. June 15, 2008 investigative report regarding Lt. Smith's alleged failure to supervise
 6. Class Specification for Liquor Enforcement Lieutenant
 7. Supplemental Job Description for Liquor Enforcement Lieutenant Smith

Appellant's Exhibits

1. July 11, 2008 letter of appeal, with attachments

2. Lt. Smith's performance evaluation for the period of December 29,2006 to December 28,2007
3. Lt. Smith's calendar for May and June 2008
4. Weekly log for employee Sara Baumgratz for the week of May 16-22,2008
5. Outlook calendar appointments for employee Sara Baumgratz for the period of May 23-30,2008

Before making the agency's offers of proof, Chief Edwards moved for dismissal of the appeal, arguing that although Lt. Smith is a dedicated, valuable employee, she had already admitted to the conduct outlined in the letter of warning, and acknowledged that she had received guidance in a Letter of Counsel dated December 24,2007 concerning a similar failure to provide appropriate supervision. The Board denied that motion and proceeded to a hearing on the merits of the appeal.

State's Offers of Proof:

1. Lt. Smith is responsible for supervising six subordinate staff members, assigning them tasks, conducting performance appraisals, promoting career development, enforcing bureau policies, investigating reports of misconduct, taking disciplinary action when appropriate, and making operational recommendations to the Chief and the Deputy.
2. Lt. Smith has an outstanding record with respect to enforcement activities, but the agency has had concerns with her ability to perform effectively as a supervisor.
3. Concerns about Lt. Smith's performance as a supervisor were raised formally in a December 24, 2007 Letter of Counseling after she allegedly failed to notify members of her staff that they were out of compliance with an earlier directive from the bureau requiring them to acknowledge receipt of various policies and procedures.
4. On Monday, May 19,2008, Lt. James Wilson of the Enforcement Bureau observed Sara Baumgratz, one of the appellant's subordinates, driving a state vehicle at approximately 6:15 p.m., outside that employee's normal working hours. Lt. Wilson notified Lt. Smith, who responded that she would look into the matter.
5. Ms. Baumgratz's normal work day concluded at 4:30 p.m., and there was no apparent reason for her to be using a State vehicle outside her regular hours of work.
6. On Monday, June 2,2008, Ms. Baumgratz was again operating her State vehicle at or about 6:15 p.m., after her regular work hours, when she was involved in a traffic accident. The vehicle, which was valued at \$12,000, sustained significant damage and was declared a total loss. Ms. Baumgratz was injured in the accident as well.
7. According to Section IV G. of the Liquor Enforcement and Licensing Administration and Operations Manual, "Employees shall promptly report any complaints or misbehavior or malfeasance on the part of any other member of the Bureau, through the proper channels."

8. Lt. Smith did not investigate or report Ms. Baumgratz's apparently unauthorized use of a State vehicle until after Ms. Baumgratz's accident on June 2, 2008, two weeks after Lt. Smith had received the complaint from Lt. Wilson.

Appellant's Offers of Proof:

1. Lt. Smith has been an investigator for the Enforcement Bureau since 1996, has received positive evaluations, and was promoted to Lieutenant in April 2007. As a lieutenant the appellant supervises six employees including a licensing specialist, a sergeant, and four other investigators throughout the state.
2. Lt. Smith acknowledged receiving a letter of counsel on December 24, 2007 for allegedly failing to provide appropriate supervision, but disputed the validity of that letter, as she believed that she was performing satisfactorily at the time.
3. The performance evaluation that Lt. Smith received January 14, 2008, a few weeks after she received the Letter of Counsel, marked her as meeting or exceeding expectations in all categories.
4. Lt. Wilson contacted Lt. Smith on Monday, May 19, 2008 and reported that he had observed Ms. Baumgratz driving her State vehicle at or about 6:15 p.m., after the conclusion of her usual work day.
5. Licensing specialists like Ms. Baumgratz work in the field responding to requests for liquor licenses and spend the majority of their time out of the office, returning to the office only one day each week for administrative duties. In the Bureau of Enforcement, because many assignments are performed in the field, employees do not always report to the office and sit side-by-side on a daily basis. Ms. Baumgratz's regular schedule called for her to work in the office on Mondays, and she was not scheduled to be in the office again until the following Monday, May 26th, a day that Lt. Smith was not scheduled to be in the office.
6. Lt. Smith believed that Ms. Baumgratz already knew the rules about not driving after hours and did not believe it was necessary to contact her immediately. In deciding how to prioritize her own time, Lt. Smith thought there might be a reasonable explanation for Ms. Baumgratz driving the State vehicle outside her normal working hours. Lt. Smith knew that there was a facility not far from Ms. Baumgratz's home where she might have been driving to get gasoline for her State vehicle. Lt. Smith also believed there was a possibility that Ms. Baumgratz had an appointment that evening and that she was working when she was seen driving the State vehicle. In light of their respective responsibilities leading up to Memorial Day, Lt. Smith did not consider the issue to be a high priority, and decided to wait until the first week of June to speak with Ms. Baumgratz face-to-face.
7. There is no policy or rule outlining how quickly an officer is expected to investigate a complaint about a subordinate's activity.

8. On May 19, 2008, when Lt. Wilson called Lt. Smith, it was after regular working hours. In the days that followed, there were limited opportunities for Lt. Smith to speak directly with Ms. Baumgratz before the date of the accident.
9. On May 20, 21, and 22, both employees were in the field. On May 23 Ms. Baumgratz was in the field and Lt. Smith was on leave. May 24 through May 26, both employees were out of the office. On May 27, Lt. Smith was in the office, but Ms. Baumgratz was unavailable as she was in the field and had appointments throughout the day. On May 28 Lt. Smith spent the day participating in an oral board evaluating candidates. On May 29 and 30, both employees were in the field. Lt. Smith worked overtime on May 31. Both employees were off-duty on June 1. Both Lt. Smith and Ms. Baumgratz were in the office on June 2 but did not have an opportunity to discuss the May 19th incident, as they were both performing administrative duties.
10. When Lt. Smith got the call from Ms. Baumgratz about the accident on the evening of June 2nd, Lt. Smith immediately called Deputy Chief Dunn and met Lt. Wilson at the scene of the accident. Lt. Smith then called Chief Edwards and went to the hospital to see Ms. Baumgratz.
11. On June 2, 2008, the day of the accident, Lt. Smith carried out all of her responsibilities including visiting the scene of the accident and checking in with the employee. She also followed-up with the employee the day after the accident and completed a report for Chief Edwards about her conversation with Ms. Baumgratz.
12. On Tuesday, June 3 Lt. Smith called Ms. Baumgratz in the hospital, questioned her about her use of the vehicle, and reported her findings to her superiors.

Position of the parties

Chief Edwards argued that unauthorized use of a State vehicle for an employee's personal use was tantamount to stealing from the State. He argued that it was alarming to learn that a lieutenant would not consider it a priority to investigate misuse of State equipment and possible theft of State resources. He argued that all the employees in Enforcement have pagers, voice mail and email access, and that there was no reasonable excuse for Lt. Smith failing to contact Ms. Baumgratz promptly about the alleged infraction. Chief Edwards argued that Lt. Smith had already been given notice about her failure to supervise, particularly in terms of communicating with staff. He argued that if an employee failed to meet a work standard, received guidance, and then failed again in that same area, the only reasonable response would be a written warning, the least severe form of discipline recognized by the Personnel Rules. He argued that supervisors must be held accountable. He argued that although Lt. Smith did what she needed to do on June 2nd and June 3rd after the accident, she did not exercise appropriate supervisory intervention after the first report of Ms. Baumgratz misusing State resources, and suggested that early intervention might have prevented the later accident, injury to the employee and loss of State property.

Mr. Choiniere argued that the Enforcement Bureau's policies and procedures do not specify how quickly a supervisor is expected to investigate complaints, and that Lt. Smith should not be disciplined for failing to meet an expectation that had not been made clear. He argued that employees have fifteen calendar days to file an appeal, and fifteen working days in which to file a grievance, suggesting that either time frame might be reasonable for expecting a supervisor to initiate an investigation. Mr. Choiniere argued that the Liquor Commission was rightfully upset about the cost of the accident, but suggested that some of the Liquor Commission's reaction to the loss of the vehicle was misdirected toward Lt. Smith. He argued that Ms. Baumgratz was the responsible party and therefore was the person who should have been held accountable for her conduct and the State's losses. Mr. Choiniere argued that the Commission needed to be clearer about its expectations concerning supervisors investigating employee conduct, and that a letter of warning in this case would help no one. He argued that Lt. Smith and Ms. Baumgratz both had higher priorities out in the field during the days between the initial report on May 19, 2008 from Lt. Wilson and the date of Ms. Baumgratz's accident on June 2, 2008, and that it was reasonable for Lt. Smith to wait until after the Memorial Day holiday to speak face-to-face with her subordinate. Mr. Choiniere argued that if the Commission still believed there was an insufficient response from Lt. Smith, the Commission simply needed to clarify its expectations and Lt. Smith would certainly meet those expectations.

Having carefully considered the evidence, arguments and the parties' offers of proof, the Board made the following findings of fact and rulings of law:

Findings of Fact:

1. Liquor Commission regulations require employees to make prompt reports of any alleged infraction, misconduct or malfeasance.
2. In some circumstances, unauthorized use of a State vehicle could be considered theft of valuable goods or services from the state as described by Per 1002.08 (b)(5) of the Personnel Rules, and a report of such conduct would warrant immediate investigation.
3. Lt. Smith's class specification indicates that she is responsible for conducting internal reviews and investigations involving Bureau sworn and civilian personnel, rules and regulations and enforcement action.
4. Lt. Smith received a report on May 19, 2008 that one of her subordinate employees was operating a State vehicle outside her regular business hours. Even if Lt. Smith was unable to undertake an immediate investigation, she had the opportunity to contact her subordinate by telephone, voice mail or pager to advise her that a complaint had been received, and to remind her that unauthorized use of State resources was prohibited.

5. Although Lt. Smith planned to speak with her subordinate about the potential infraction some time during the first week of June, she took no other steps to notify the employee or her own superiors that the incident had been reported and would require some level of review or investigation..
6. Before Lt. Smith spoke to her subordinate, the subordinate was involved in an automobile accident while again engaging in the unauthorized use of a State vehicle. The accident resulted in injury to the employee. The cost of damage to the vehicle was estimated at \$12,000 and the vehicle was declared a total loss.

Rulings of Law:

- A. Ms. Baumgratz's unauthorized use of a State vehicle could have been treated by the Liquor Commission as "theft of valuable goods or services from the state" as described by Per 1002.08 (b)(5) of the NH Code of Administrative Rules, qualifying it as an offense for which the employee might have been dismissed without prior warning.
- B. By failing to make appropriate or timely inquiries regarding the report that Ms. Baumgratz had used a State vehicle without authorization, possibly in violation of Per 1002.08 (b)(5), Lt. Smith violated Policies and Procedures for the Enforcement Bureau and failed to meet work standards for her position as a supervisor.
- C. In deciding to issue a written warning to Lt. Smith, the Enforcement Bureau took into account the provisions of Per 1002.03 of the NH Code of Administrative Rules, which states, "In determining the appropriate form of discipline under Per 1002.04 through 1002.08, an appointing authority may consider factors including, but not limited to: (a) The nature and severity of the conduct or offense in relation to the employee's position classification, responsibilities, and accountabilities, and the functions of the agency; and (b) The employee's past record of performance and discipline, including whether or not the employee has been disciplined in the past for the same or a similar offense."
- D. The Liquor Commission acted within its authority, consistent with Per 1002.04 (a) of the NH Code of Administrative Rules, by issuing a written warning as the least severe form of discipline to correct Lt. Smith's unsatisfactory work performance and failure to meet work standards in her capacity as Ms. Baumgratz's supervisor.

Decision and Order:

Although Lt. Smith may not have considered the complaint about her subordinate a priority as the agency approached the Memorial Day weekend, the Enforcement Bureau's operations manual clearly required her to make a prompt report of any complaint regarding her subordinate's alleged misconduct. In the Board's opinion, Lt. Smith failed to make a prompt report, and therefore failed to carry out tier supervisory duties.

As the record reflects, the Bureau of Enforcement considers Lt. Smith to be a valuable, dedicated employee, and describes her as "second to none" with respect to her enforcement activities. Evaluating her effectiveness as a supervisor, however, the agency had legitimate concerns when Lt. Smith failed to respond in a timely or appropriate fashion when advised that one of her subordinates was operating a State vehicle after hours without authorization. Despite the appellant's argument that the agency should not have issued a warning to an employee who had been evaluated as meeting expectations in all categories in her performance evaluation, the Board found that the incident giving rise to the warning was significant and warranted formal discipline.

For all the reasons set forth above, the Board voted unanimously to uphold the written warning issued to Lt. Smith on July 3, 2008, and to DENY Lt. Smith's appeal.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

/s/

Philip Bonafide, Acting Chair

/s/

Robert Johnson, Commissioner

/s/

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel, 25 Capitol St., Concord, NH 03301
Randy Choiniere, SEA Grievance Representative, State Employees Association, 105 N. State St., Concord,
NH 03302-3303
Evie Taft, HR Administrator, NH State Liquor Commission, 50 Storrs St., Concord, NH 03301
Eddie Edwards, Chief, Bureau of Enforcement, 10 Commercial St., Concord, NH 03303-1795